No. 03-215

IN THE

Supreme Court of the United States

BRIDGEPORT MUSIC, INC.; SOUTHFIELD MUSIC, INC.; WESTBOUND RECORDS, INC.; and NINE RECORDS, INC.,

Petitioners,

v.

STILL N-THE WATER PUBLISHING and N-THE WATER PUBLISHING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents disagree with the Question Presented as articulated by Petitioners in their Petition for Writ of Certiorari.

The question presented is whether, in a case where all parties to the dispute are nonresidents of the forum state, a federal court may, in manner consistent with constitutional due process, assert personal jurisdiction over a nonresident defendant who granted a royalty-bearing license to a manufacturer of phonograph records who, in turn, injected the phonograph records into the stream of commerce and where allegedly copyright-infringing material was contained on phonograph records for retail sale in the forum state.

STATEMENT PURSUANT TO RULE 29.6

Neither Respondent has a parent company and no publicly held company owns 10% or more of the stock in either Respondent.

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STATEMENT OF THE CASE

Respondents generally agree with the procedural statements in the Petitioners' Statement of the Case, Petition at 2-7, but find that their Petition is replete with mis-characterizations and omissions of important substantive facts that bear upon the issues that would properly be before the Court should it choose to accept this case for review.

I. No Party Is a Resident of the Forum State

Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (collectively "Bridgeport") are Michigan corporations whose principal places of business are believed to be in Michigan. N-The Water Publishing, Inc., individually and d/b/a Still N-The Water Publishing (collectively "NTW") is a Texas corporation whose only place of business is in Texas.

In addition, there were other defendants in the litigation over whom the district court had personal jurisdiction. Bridgeport attempts to take advantage of their presence in attempting to show the propriety of jurisdiction over NTW, despite the fact that the other defendants are wholly separate and independent entities. The additional defendants include EMI Group, plc., a United Kingdom private limited company whose principal place of business is located in England; EMI Recorded Music, an Illinois corporation whose principal place of business is in California; EMI Music Distribution, an Illinois corporation whose principal place of business is in California; Virgin Records America, Inc., a Delaware

corporation whose principal place of business is in California; Noo Trybe Records, Inc. d/b/a Rap-A-Lot Records ("Rap-A-Lot"), a Delaware corporation whose principal places of business were in California and Texas; and Hollywood Pictures Corporation, a California corporation with its principal place of business in California.

Two entities whose relationship with NTW Bridgeport considers important for jurisdictional purposes are: The American Society of Composers, Authors, & Performers, Inc. ("ASCAP"), a New York corporation with its principal place of business in New York; and Broadcast Music, Inc. ("BMI"), a New York corporation with its principal place of business in New York. ASCAP and BMI are known in the music industry as "performing rights societies" or "performing rights organizations" ("PROs").[1] ASCAP and BMI each maintain an office in the forum of the litigation, the Middle District of Tennessee (Nashville).

II. Structure of the Music Business

In its Petition Bridgeport fails to explain critical differences in the functions of a music publisher, a recorded music company, and a distributor. A music publisher ("publisher") owns "musical works,"[2] commonly referred to

1. A "'performing rights society' [also called a "performing rights organization"] is an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101 (2003). NTW is not affiliated with SESAC, Inc.

2. "Musical work" is not defined in the Copyright Act of 1976, as amended. *See* H.R. Rep. No. 94-1476, at 55-56 (1976) ("Of the

(Cont'd)

as "compositions," for the purpose of commercially exploiting them for financial gain. All publishers grant mechanical licenses to recorded music companies (typically called "record labels") for the purpose of authorizing the record label to incorporate the compositions into one or more "master" sound recordings.[3] The record label duplicates the master sound recording in the form of phonograph records[4], *e.g.*, compact discs, cassette tapes, etc. The record label delivers the phonograph records to a "distributor," who, as its name says, distributes phonograph records to retail outlets. Consumers purchase phonograph records from retail outlets.

(Cont'd)

seven items listed, four are defined in section 101. The three undefined categories –'musical works,' 'dramatic works,' and 'pantomimes and choreographic works'– have fairly settled meanings."). Generally speaking, a musical work, or "composition," is a particular sequence and arrangement of music and/or lyrics that comprise what is commonly referred to as a "song."

3. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2003).

4. "'Phonorecords' are material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ." 17 U.S.C. § 101 (2003).

The publisher is entitled to a "mechanical royalty"[5] for each phonograph record containing a publisher-licensed composition that is sold by the record label's distributor to a retailer. Resp. Opp. App. at 12a. Mechanical royalties are paid by the record label to the publisher. Resp. Opp. App. at 12a. Publishers are also entitled to "performance royalties" for each time one of their compositions is publicly performed, *e.g.*, on the radio, on television, over a jukebox, etc. Performance royalties are paid by the PROs to the publisher. Resp. Opp. App. at 15a.

Importantly, once a publisher licenses a composition to a record label, the publisher ceases to have any further control over how – or whether – the composition is commercially exploited. Resp. Opp. App. at 18a-20a, 22a. Stated differently, if the record label chooses to record, duplicate, and secure a distributor to distribute phonograph records containing licensed compositions, the publisher does nothing except (1) passively receive mechanical royalties from the record label, and (2) passively receive performance royalties from PROs. *See* Resp. Opp. App. at 18a-20a, 22a. Simply put, a publisher is not involved in deciding whether to deliver phonograph records into the stream of commerce. Resp. Opp. App. at 18a-20a, 22a.

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5. A "mechanical royalty" is the royalty paid for each sound recording sold.

III. Mis-Characterized & Omitted Facts

A. Bridgeport Attempts to Impute to NTW Conduct of Others in Tennessee

The Court has emphasized in its personal jurisdiction decisions that it is the defendant's *own contact* with the forum state that serves as the measuring stick for minimum contacts analyses. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Bridgeport, however, tries to impute to NTW the purposeful contacts with Tennessee of unrelated entities such as Rap-A-Lot, EMI Manufacturing and EMI Music Distribution to satisfy the constitutional requirement that the defendant itself purposefully directed conduct toward Tennessee. NTW has *itself* taken no action directed toward and made no intentional contact with the forum state.

To the contrary, NTW's only conduct was the granting of copyright licenses and passive receipt of revenue (and very limited marketing that did not take place in and was not directed toward any resident of Tennessee). Resp. Opp. App. at 1a-4a, 18a-19a, 23a-25a. For NTW, the decisions to grant copyright licenses, and the negotiation and drafting thereof, would have taken place only in Texas, California, and/or New York. No such conduct would have taken place in Tennessee or with a Tennessee resident.

Bridgeport recognizes these facts and is thus forced to characterize NTW as being involved in the manufacturing, marketing, distribution, and selling processes in order to bootstrap the non-forum-related conduct of NTW to the activities of the manufacturer, marketer, distributor, and seller that were purposefully directed to Tennessee. With an understanding of the interrelationship between the separate entities performing distinct functions within the music industry, NTW identifies the following perceived misstatements of fact in Bridgeport's Petition.

B. Rap-A-Lot is Not "NTW's Record Label"

Bridgeport characterizes Rap-A-Lot as "NTW's record label." Pet. at 2. This characterization is misleading. Rap-A-Lot is a wholly-owned subsidiary of Virgin Records America, Inc., which, in turn, is a subsidiary of EMI Recorded Music North America, which, in turn again, is a subsidiary of the EMI Group, plc., a United Kingdom private limited company whose stock is publicly-traded in the United Kingdom on London's FTSE stock exchange and in the United States on the NASDAQ's OTC exchange. By characterizing Rap-A-Lot as "NTW's record label," Bridgeport attempts to create the perception that NTW owns an interest in one or more of the companies responsible for creating sound recordings (Rap-A-Lot). Such is not the case. Resp. Opp. App. at 2a, 6a-10a. NTW has never owned any part of Rap-A-Lot. Resp. Opp. App. at 10a.

C. NTW Does Not Own a Distributor, Does Not Engage in Distribution, & Does Not Engage in Marketing in the Forum

Bridgeport seeks to impute the conduct of the separately-owned record label and distributor to NTW by portraying NTW as (1) either owning the distributor, or being involved in the actual distribution of phonograph records in the forum state; and (2) marketing in the forum. For example, Bridgeport asserts that NTW is engaged in the business of "distributing the infringing compositions and sound recordings. . . ." Pet. at 2; *see also* Pet. at 6. Bridgeport redoubles its efforts later in the Petition when it erroneously asserts that it "established through the presentation of evidence" that "NTW and its distributor market in Tennessee."

Bridgeport knows that NTW does not own any distributor, and Bridgeport knows that, as a publisher, NTW does not distribute compositions or sound recordings and does not market in the forum state. Resp. Opp. App. at 2a, 6a-10a, 13a-15a, 23a-25a. Bridgeport also knows NTW's marketing efforts are limited to mailing previously-recorded versions of its compositions to film studios or production companies who may wish to include an NTW composition in an upcoming motion picture, and nothing in the record indicates that any such marketing was directed at Tennessee or one of its residents. Resp. Opp. App. at 3a. NTW engages in no other marketing or advertising. Resp. Opp. App. at 3a.

D. Bridgeport Established Nothing By "Presentation of Evidence in the District Court" Because the District Court Did Not Hold an Evidentiary Hearing

On page 24 of its Petition Bridgeport writes that it established "through the presentation of evidence in the district court that NTW purposefully directed conduct to Tennessee. . . ." Bridgeport's statement is incorrect: the district court did not make any evidentiary findings. Pet. App. at 7a ("The district court granted the parties a limited time to conduct jurisdictional discovery, but did not conduct a hearing on either NTW or DM's motions to dismiss."); Pet. App. at 34a n.8 ("Because the Court has chosen to rule on the parties written submissions, it cannot give any weight to NTW's controverting assertions.").

Trying to capitalize on the fiction of evidentiary findings, Bridgeport makes the following misstatements of fact. First, Bridgeport writes that "NTW granted the rights to distribute sound recordings . . . in Tennessee." Pet. at 24. NTW does not own any rights in any sound recordings.

Resp. Opp. App. at 8a-9a. NTW cannot grant rights it does not possess. Second, Bridgeport asserts that "NTW granted distribution rights. . . ." Pet. at 24. The products that were distributed are phonograph records made from sound recordings owned by the record labels. The entity owning the rights to (1) duplicate the sound recordings into phonograph records, and (2) distribute the phonograph records containing the sound recordings is the record label, Rap-A-Lot, not NTW. Resp. Opp. App. at 12a-13a. Third, Bridgeport inaccurately asserts that NTW receives performance royalties from ASCAP and BMI for the compositions at issue in this case. Pet. at 24. NTW's corporate representative testified that NTW had never received any royalties from either ASCAP or BMI in connection with the subject compositions. Resp. Opp. App. at 15a.

E. NTW Does Not Own or Operate an Internet Website

Bridgeport further attempts to manufacture for NTW contacts with the forum state by implicitly characterizing NTW as selling sound recordings over the Internet. Pet. at 7. Bridgeport again fails to appreciate the role of a publisher. NTW does not create sound recordings or manufacture phonograph records. Resp. Opp. App. at 12a. NTW does not engage in marketing or sales of phonograph records. Resp. Opp. App. at 19a. Most importantly in the context of Bridgeport's argument, NTW does not own or operate an Internet website. Resp. Opp. App. at 11a, 18a.

F. Affiliation as Publisher-Member With a PRO is a Practical Requirement to Engage in the Music Publishing Business

Next, Bridgeport relies upon NTW's affiliation with ASCAP and BMI as a publisher-member in support of its claim that jurisdiction is proper. To that end, Bridgeport points out that NTW licenses its entire catalog of compositions to ASCAP and BMI; that ASCAP and BMI license those compositions for public performances to third parties; and that ASCAP and BMI monitor the public performances of the compositions and collect performance royalties due NTW for such performances.

Bridgeport fails to inform the Court, however, that *every* publisher is required, as a practical matter, to license its entire catalog of compositions to a PRO, and there are only three of them in existence: ASCAP, BMI, and SESAC. A brief summary of the PROs' functions explains why publishers must affiliate with them. The business of the PROs may be divided into three categories: (1) issuing "blanket" licenses to third parties for public performances; (2) monitoring third parties to determine how frequently compositions are played; and (3) collecting the royalties owed for each public performance and paying the publisher its share of the performance royalties. PROs accomplish the monitoring tasks through the use of various statistical sampling and survey models, and various electronic tracking programs. Simply put, only the PROs are equipped to conduct the services required to monitor and collect performance royalties. As a practical matter, NTW is required to affiliate with a PRO. It is significant, in the context of this case, that NTW chose not to affiliate with SESAC, which is headquartered in Tennessee, the forum state. Finally, the fact that ASCAP and BMI have offices in Tennessee is merely a fortuitous circumstance over which NTW has no control.

G. Bluewater Agreement Raised for First Time on Appeal

Lastly, Bridgeport raises the issue of a foreign administration agreement that NTW executed with Bluewater Music Co. d/b/a Mighty Nice Music on or about December 1, 1998 ("Bluewater Agreement"). Pet. at 7. Bridgeport raised the issue of the Bluewater Agreement for the first time on appeal and the Sixth Circuit declined to address the issue.

REASONS FOR DENYING THE PETITION

There are four reasons the Court should deny Bridgeport's Petition. First, Bridgeport essentially seeks a rule whereby a publisher who licenses a composition to be embodied in a master sound recording that is duplicated in a phonograph record and distributed to a forum state "in effect appoint[s] the chattel his agent for service of process" such that its "amenability to suit would travel with the chattel," namely, the phonograph record. The Court already rejected this type of argument in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and there is no reason the Court should reconsider its position.

Second, while there is a split among the circuits in determining whether to follow the O'Connor or Brennan approach in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), only one appellate court – the Sixth Circuit – has unequivocally and expressly chosen one of the standards as the more appropriate rule. Pet. App. at 14a. The Court should wait for further concrete development in the decisions of the circuit courts before addressing the stream of commerce issue again.

Third, Bridgeport essentially asks the Court to judicially legislate a personal jurisdiction standard based on a "national contacts" theory specifically for the music industry. In support of its implicit request, Bridgeport argues that a music copyright infringement plaintiff cannot obtain relief in a single forum. Its argument is incorrect: under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*, a plaintiff may obtain complete relief from a single copyright defendant in a single jurisdiction because each defendant is jointly and severally liable for such infringement. Moreover, plaintiffs who have causes of action against multiple defendants have no constitutional right to sue all in the same forum.

Fourth, the Petition should be denied because, NTW asserts, jurisdiction would not be proper under *either* the "pure" stream of commerce test espoused by Justice Brennan, or the stream of commerce "plus" test articulated by Justice O'Connor in *Asahi*. Bridgeport argues that the Court should accept this case because, it contends, jurisdiction would be proper under Justice Brennan's approach. In *Asahi*, Justice Brennan wrote that "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products *from manufacture to distribution to retail sale*." *Asahi*, 480 U.S. at 117 (emphasis added). As a publisher, NTW is not involved in either the manufacturing, distribution, or retail sales processes. Resp. Opp. App. at 6a-10a.

I. MISSTATEMENTS OF LAW

A. DEVELOPING TRENDS IN STREAM OF COMMERCE THEORY IN THE CIRCUIT COURTS

Bridgeport maintains that, since *Asahi*, the federal courts of appeal have become "deeply divided" in their analyses of when a federal court may assert personal jurisdiction over a nonresident defendant. Specifically, Bridgeport states that the circuits have struggled with determining whether a defendant who has placed goods in the stream of commerce has purposefully availed itself of the privilege of conducting activities in the forum state.

NTW acknowledges that the circuits do not have a uniform approach to these very fact-specific determinations. A careful review of the decisions cited by Bridgeport and other cases, however, shows that the nature of the conflict is not such that plenary review by the Court is warranted in this case. Most circuits have thus far avoided expressly choosing between the "pure" stream of commerce and stream of commerce "plus" tests, and the Sixth Circuit's decision may in fact represent the beginning of a trend. NTW proposes that it would be appropriate for the Court to wait until other circuits have more decisively addressed the issue to determine whether there is a trend toward adopting one of the tests.

1. FIRST CIRCUIT COURT OF APPEALS

The First Circuit Court of Appeals effectively rejected the "pure" stream of commerce test prior to *Asahi*. *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 682 (1st Cir. 1992) (citing *Dalmau Rodriguez v. Hughes Aircraft Company*, 781 F.2d 9 (1st Cir. 1986)). The First Circuit has continued using its pre-*Asahi* test, and has effectively adopted Justice O'Connor's approach. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81 (1st Cir. 1997); *Sawtelle v. Farrell*, 70 F.3d 1381, 1393 (1st Cir. 1995).

2. Second Circuit Court of Appeals

In its most recent opportunity to adopt either Justice O'Connor's or Justice Brennan's theory, the Second Circuit Court of Appeals declined to make a choice because the facts of the case met the more stringent O'Connor standard. *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2nd Cir. 1999). The Second Circuit appears to believe that Justice Brennan's broad stream of commerce approach might be limited to products liability cases. *Kernan*, 175 F.3d at 244 ("Justice Brennan's concurring opinion . . . would have established a 'stream of commerce' standard in products liability cases. . . .").

3. Third Circuit Court of Appeals

The Third Circuit Court of Appeals' most recent opportunity to choose one of the stream of commerce approaches articulated in *Asahi* came in 1998 in *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197 (3d Cir. 1998). The Third Circuit also declined to adopt either approach. *Id.* at 207 ("regardless of whether one applies the O'Connor standard or the Brennan standard, Colelli purposefully availed itself of the laws of Pennsylvania. . . . Consequently, we remand the case to the district court without adopting one position or the other on the issue of minimum contacts based on the stream-of-commerce theory.").

Moreover, in a pre-*Asahi* decision, the Third Circuit questioned whether the stream of commerce theory could appropriately be applied to a patent infringement case, *i.e.*, infringement of intellectual property. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 299 n. 12 (3rd Cir. 1985) ("Where, as here, plaintiff is also a multistate actor and where, unlike a products liability case, there is no showing of particularly localized harm, it is questionable whether the same tolerance

for broad jurisdiction is reasonable."). The Third Circuit has not squarely addressed the issue of whether stream of commerce theory should be applied at all in the intellectual property infringement context.

4. Fourth Circuit Court of Appeals

Bridgeport erroneously delineates the current state of stream of commerce theory in the Fourth Circuit Court of Appeals. The Fourth Circuit implicitly adopted Justice O'Connor's test in *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-945 (4th Cir. 1994). In doing so, first the court reconciled the distinctions between *World-Wide Volkswagen* and *Asahi*, writing:

> [w]hile *World-Wide Volkswagen* has been cited for the proposition that personal jurisdiction may follow a product if it is delivered "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum state," we read the holding of the case to be much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.

Lesnick, 35 F.3d at 944-945. Further, "[n]otwithstanding the breadth of this 'stream of commerce' language, the entire opinion [of *World-Wide Volkswagen*] indicates that the Court has not abandoned the notion that jurisdiction must rest on a person's activity *deliberately directed toward the forum state*." *Lesnick*, 35 F.3d at 944-945 (emphasis in original). Consequently, the Fourth Circuit concluded, a plaintiff "cannot rely simply upon the 'stream of commerce' logic to establish jurisdiction." *Id.*

Bridgeport's citation to *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), Petition at 9, does not bear upon the issues that would be before the Court because it does not involve stream of commerce theory. The quotation offered by Bridgeport relates to the complexities of safeguarding a defendant's due process rights in the face of ever-evolving technology, *e.g.*, asserting jurisdiction based on a nonresident defendant's use of the Internet. *ALS Scan*, 293 F.3d at 711. The case before the Court does not involve the defendant's use of the Internet because the defendant does not maintain a presence on the Internet. Resp. Opp. App. at 11a.

5. Fifth Circuit Court of Appeals

The Fifth Circuit followed a test analogous to Brennan's approach prior to the Court's *Asahi* decision. *See, e.g., Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984). Although the Fifth Circuit has declined to depart from its pre-*Asahi* precedents in products liability cases, *see Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 419-420 (5th Cir. 1993), in its most recent stream of commerce decision the Fifth Circuit noted that it has expressly chosen not to extend Justice Brennan's test to copyright or contract cases. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (citing *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 (5th Cir. 1993) (copyright case) and *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000) (contract case)). Bridgeport's blanket assertion that the Fifth Circuit "follow[s] the reasoning of Justice Brennan's plurality opinion in *Asahi*. . . " is an overstatement.

6. Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals expressly adopted Justice O'Connor's approach in the case now before the Court.

7. Seventh Circuit Court of Appeals

Bridgeport informs the Court that the Seventh Circuit's analysis in *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) is "especially insightful" and regards the case as a vigorous rejection of Justice O'Connor's approach. Pet. at 10. Bridgeport fails to acknowledge, however, that the Seventh Circuit remarked that it decided the case under Justice Brennan's position because that was the law in the circuit before *Asahi* and, because *Asahi* did not produce a majority opinion, the Seventh Circuit declined to depart from its precedents. In fact, the *Dehmlow* Court also acknowledged that the more stringent test articulated by Justice O'Connor was met under the facts of that case. *Dehmlow*, 963 F.2d at 947.

Moreover, it is questionable whether the Seventh Circuit would choose to apply the stream of commerce theory at all to a nonresident defendant who merely grants a royalty-bearing license for intellectual property that is developed, marketed, and sold in the forum state by third parties. *Cf.*, *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773 (7th Cir. 2003) (although case was decided on other grounds, the Seventh Circuit cited without rebuke the district court's conclusion that stream of commerce theory could not be applied to resident of foreign nation who licensed patent rights to a wholly-owned subsidiary who, in turn, developed, manufactured, marketed, and sold the product in the forum state, reasoning that issuing a license "does not place any products into the stream of commerce. . . .").

8. Eighth Circuit Court of Appeals

The Eighth Circuit Court of Appeals decisions are not muddled as Bridgeport contends. Though the Eighth Circuit has not expressly adopted either O'Connor's or Brennan's model, in *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990), that court issued an opinion consistent with Justice O'Connor's approach and that circuit's pre-*Asahi* precedent, stating: "[li]ke the nonresident defendant in *Asahi*, appellees' placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State." *See also Soo Line R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526 (8th Cir. 1991) (rejecting the "national contacts" theory, the court pointed out that "minimum contact analysis does not permit contact with a market to substitute for contact with a forum.").

In 1991 the Eighth Circuit decided *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991), a case that Bridgeport argues is inconsistent with *Falkirk*. *Dakota Industries* is not inconsistent with *Falkirk*; rather, it is distinguishable on its facts, facts that invited the application of the Court's "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984).

Bridgeport next argues that the Eighth Circuit's decisions in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994) and *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir. 2000) evidence an acceptance of Justice Brennan's stream of commerce approach and, thus, a more significant split among the circuits. Neither case overruled or criticized *Falkirk*, they simply distinguished it on the facts. *Clune*, 233 F.3d at 539 n.9 (explaining distinctions in *Falkirk*). In fact, in *Clune* the Eighth Circuit tacitly

recognized the viability of the O'Connor approach when the court said "[i]n the present case, [the defendant] did more than simply set product adrift in the international stream of commerce." *Clune*, 233 F.3d at 543. Closing the loop, in *Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607 (8th Cir. 1998), the Eighth Circuit cited *Falkirk* with approval and distinguished *Barone* from the facts of *Guinness Imports* on the grounds that *Barone* was a personal injury products liability case whereas *Guinness Imports* was a commercial dispute.

9. Ninth Circuit Court of Appeals

Although it has not *per se* adopted either *Asahi* test, the Ninth Circuit hints at approval of Justice O'Connor's standard. *See Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995)

> At least a majority and perhaps all the justices agreed in *Asahi* that jurisdiction cannot be founded on the mere presence of a product in the forum, where the product has not been marketed there, and its presence there is not part of the regular and anticipated flow of the of products from the manufacturer.

Cf., *Rano v. Sipa Press, Inc.* 987 F.2d 580 (9th Cir. 1993) (rejecting plaintiff's argument that a nonresident defendant in a copyright infringement case who "caused and profited from [the distributor's] grant of licenses of [the plaintiff's] photographs to magazine publications that he knew would be distributed in California" satisfied the "purposeful availment" and "arising out of" prongs of the minimum contacts analysis).

10. Tenth Circuit Court of Appeals

The Tenth Circuit Court of Appeals has not squarely addressed stream of commerce theory since *Asahi* was decided. In explaining the purposeful availment portion of the minimum contacts analysis in *Kuenzle v. HTM Sport-Und Freizeitgeräte A.G.*, 102 F.3d 453, 458 (10th Cir. 1996), however, the Tenth Circuit cited to Justice O'Connor's opinion without mention of the competing analysis articulated by Justice Brennan. Further, in reversing a district court's assertion of jurisdiction, the Tenth Circuit wrote in *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1094-1095 (10th Cir. 1998) that the district court's "assertion of jurisdiction seem[ed] to be based entirely on foreseeability – a position at odds with the Supreme Court's directive that foreseeability alone is an insufficient basis on which to establish minimum contacts." *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 295).

11. Eleventh Circuit Court of Appeals

Although the Eleventh Circuit has not expressly adopted a particular stream of commerce test, that court clearly approves of and consistently applies Justice O'Connor's standard: "foreseeability required to exercise jurisdiction is 'not the ability to see that the acts of third parties may affect the forum, but rather that the [actor's] own purposeful acts will have some effect in the forum.'" *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216-1217 (11th Cir. 2000) (quoting *Madara v. Hall*, 916 F.2d 1510, 1517 (11th Cir. 1990)); *see also Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070, 1075 (11th Cir.1999); *Madara*, 916 F.2d at 1519 ("By giving the interview, Hall did not appoint copies of the magazine as his

agent for service of process wherever a third party, the publisher, might choose to send those magazines."). *Cf.*, *World-Wide Volkswagen*, 444 U.S. at 296 ("Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.").

Bridgeport's citation to *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), is inapposite because jurisdiction there was based on the nationwide service of process provisions of the Foreign Sovereign Immunities Act of 1976 and FEDERAL RULE OF CIVIL PROCEDURE 4(k)(1)(d). *Vermeulen*, 985 F.2d at 1548. *Vermeulen* embraces circumstances not present in the case before the Court because the Copyright Act of 1976 does not authorize nationwide service of process.

12. DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

There appear to be no opinions from the District of Columbia Circuit Court of Appeals directly addressing stream of commerce theory since its 1981 decision in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981). The District of Columbia District Court, however, considers Justice O'Connor's model a well-settled statement of law. *See, e.g.*, *Formica v. Cascade Candle Co.*, 125 F. Supp. 2d 552, 555 (D.D.C. 2001).

> Even if defendant put its candles into a national stream of commerce with the knowledge that they would reach the District, it is well-settled that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of

> placing the product into the stream into an act purposefully directed toward the forum State."

(citing and quoting Justice O'Connor's opinion in *Asahi*, 480 U.S. at 112).

13. Federal Circuit Court of Appeals

The Federal Circuit has thus far declined to adopt either of the *Asahi* plurality opinions. *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 428 (Fed Cir. 1996) ("as in *Beverly Hills Fan*, we need not join the debate in *Asahi* as to which version of the stream of commerce theory is the correct one."); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994) ("We need not join this debate here, since we find that, under either version of the stream of commerce theory, plaintiff made the required jurisdictional showing.").

Further, it is doubtful whether the Federal Circuit Court of Appeals would apply stream of commerce theory to a nonresident licensor of intellectual property. In *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), a nonresident defendant owned certain patent rights and licensed them to a third party. The nonresident licensor's "sole business is licensing and enforcing the rights associated with two patents." *Red Wing*, 148 F.3d at 1357. Though the nonresident defendant's licensees had significant contact with the forum state, Minnesota, the Federal Circuit wrote that factor was "insufficient to submit [the nonresident defendant] to personal jurisdiction in the state" because "[i]n simple terms, doing business with a company that does business in Minnesota is not the same as doing business in Minnesota." *Red Wing*, 148 F.3d at 1361.

The Federal Circuit also flatly rejected an argument upon which Bridgeport relies heavily, finding that receipt of income from a royalty-bearing license from the forum state was irrelevant because it was only collaterally related to the forum: "[The nonresident defendant's] receipt of royalty income from its licensees for sales made in Minnesota is equally irrelevant. '[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State.'" *Red Wing*, 48 F.3d at 1361-1362 (quoting *World-Wide Volkswagen*, 444 U.S. at 299).

II. Summary of Circuit Court Trends

Bridgeport urges that the Sixth Circuit's decision represents the "minority view within the post-*Asahi* jurisdictional analysis [sic] of most circuits. . . ." Pet. at 25. In support of its claim, Bridgeport contends that the First and Sixth Circuits have adopted O'Connor's standard; the Fourth Circuit "implicitly" applies Justice O'Connor' test; the Second, Third, Ninth, Eleventh and Federal Circuits have declined to adopt either of the *Asahi* plurality opinions; the Eighth Circuit has applied both models; and the District of Columbia and Tenth Circuits have not addressed the issue at all. Pet. at 8-12. In Bridgeport's estimation, the Fifth and Seventh Circuits follow Justice Brennan's approach. Pet. at 10. Even accepting Bridgeport's claims at face value one may not logically conclude that O'Connor's position is the minority view because only two of the 13 circuits would be considered to have adopted Justice Brennan's approach.

Bridgeport's declaration that the Sixth Circuit's opinion in the case before the Court "is certainly not in accord with the pre- and post-*Asahi* music copyright cases" is also fallacious. As an initial matter, assuming the cases to which it alludes are the four on pages 19-23, none of the cases cited therein are appellate court decisions. Second, the music copyright cases cited by Bridgeport are distinguishable on their facts or have been criticized or questioned by other courts as misstatements of law. *See, e.g., Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp. 2d 653 (M.D. Tenn. 2002); *Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp. 2d 505, 511 n.5 (S.D.N.Y. 2001).

Further, the following cases cited by Bridgeport are inapposite because they were decided using the *Calder* "effects test." *Calder*, 465 U.S. at 789-91; *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Dakota Indus.*, 946 F.2d 1384; *Gray v. St. Martin's Press, Inc.*, 929 F. Supp. 40 (D. N.H. 1996); *Johnson v. Tuff N Rumble Mgmt., Inc.*, No: 99-1374 Section: R(3); 1999 U.S. Dist. LEXIS 19574, at *4-5 (E.D. La. December 15, 1999). For the *Calder* effects test to apply in this case, Bridgeport would have had to have alleged and shown that NTW intentionally infringed Bridgeport's copyrights "for the very purpose of having [the] consequences felt in" Tennessee. *Dakota Indus.*, 946 F.2d at 1390-1391. Bridgeport made no such allegation or showing.

In sum, the Sixth Circuit Court of Appeals is the only appellate court to unequivocally and expressly adopt either of the *Asahi* standards by opting to make Justice O'Connor's standard the law in the Sixth Circuit. Pet. App. at 14a. On the other hand, no federal appellate court has expressly adopted the "pure" stream of commerce test espoused by Brennan. At this time, it is appropriate for the Court to wait and see if the Sixth Circuit is leading a judicial trend before again addressing the stream of commerce issue.

III. Bridgeport is Not Guaranteed the Right to Sue Multifarious Nonresident Defendants in Single Lawsuit in a Single Forum

Though not expressly stated by Bridgeport, one implication of its statement that the Sixth Circuit "ensured that a plaintiff alleging copyright infringement against music publishers and others from different states involved in the sale and distribution of an infringing composition cannot obtain relief in one legal proceeding filed in one federal forum," Petition at *i*, is that Bridgeport and other copyright infringement plaintiffs have a *right* to obtain relief in a single legal proceeding in one court. No such right is guaranteed by the United States Constitution or granted by the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*, as amended.

On the other hand, the Constitution and this Court's interpretation thereof *does* guarantee a nonresident defendant the right to due process before a federal court sitting in the forum state may assert jurisdiction over him or her. *See, e.g.*, U.S. Const. amend. XIV, § 1; *Asahi*, 480 U.S. 102; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

CONCLUSION

Bridgeport's Petition should be denied. Bridgeport argues that the Court should take this opportunity to revisit *Asahi* to establish a uniform stream of commerce theory. NTW submits that it would be appropriate to wait and see if the Sixth Circuit's decision is the leading edge of a judicial trend. Further, Bridgeport implicitly seeks the formulation of a special rule of personal jurisdiction for the music industry, a standard based on "national contacts" that would essentially appoint phonograph records as "agents" for service of process. A similar rule was rejected in *World-Wide Volkswagen*. Finally, even under Justice Brennan's theory jurisdiction would be improper because as a licensor, not a manufacturer or seller, NTW did not inject any goods into the stream of commerce.

For these reasons and all others stated herein, NTW respectfully requests that this Honorable Court deny Bridgeport's Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION TESTIMONY OF BRUCE TOVAL, NTW'S CORPORATE REPRESENTATIVE, DATED JULY 24, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 3:01-0412[1]

BRIDGEPORT MUSIC, INC., et al,

Plaintiffs,

V.

11C Music, et al,

Defendants.

* * *

[Toval 15:19-17:15]

Q. Is there any other relationship between N-The Water Publishing and Virgin Records other than a source

---

1. This deposition was taken before the district court severed the original Case Number 3:01-0412 into 476 separate lawsuits on July 25, 2001. The severed district court Case Numbers in which Respondents were named as defendants include: 3:01-0707; 0749; 0750; 0860; 0869; 0881; 0894; 0895; 0964; 1093; 1094; 1128.

for musical compositions to be included on sound recordings released by Virgin Records?

A. No.

Q. Is there any other relationship between N-The Water Publishing and Noo Trybe Records, Inc. other than that N-The Water Publishing is a publishing company that licenses its musical compositions to be included on sound recordings released by Noo Trybe Records?

A. No.

Q. Does N-The Water Publishing act in the entertainment industry in any way other than as a Publisher?

A. No.

Q. Does it manage any artists?

A. No.

Q. Does it book any dates for artists?

A. No.

Q. Does it act as any type of agent for any artists?

A. No.

Q. Other than providing publishing services, does N-The Water publishing provide any other services — strike all that. Besides publishing and administration, does N-The Water Publishing provide any other services for song writers with which it is affiliated?

A. Other than publishing services, no.

Q. Does N-The Water Publishing undertake any form of advertising or marketing to encourage exploitation of its musical compositions?

A. Very limited.

Q. What exactly is the advertising or marketing activity that N-The Water Publishing undertakes?

A. Primarily, we'll mail copies of the songs to people that we hear about do movies.

Q. In other words, if you become aware that a film studio or a film production company is about to create a movie or might need music for inclusion in the movie, you will submit a copy of a previously recorded N-The Water musical composition for them to consider licensing?

A. Yes.

Q. Any other advertising or marketing type of activity that N-The Water undertakes with regard to its musical compositions?

A. No.

* * *

[Toval 23:2-24:17]

Q. And if we look at the United States, having a Rap-A-Lot record sold in more states rather than fewer states benefits N-The Water, correct?

A. Not necessarily.

Q. As a general rule, more states is going to mean more sales for Rap-A-Lot, correct? The more locations you're in, the more sales you're going to make?

MR. FASTHOFF: Objection. Asked and answered. He gave you his answer.

Q. (BY MS. DAVIS) You can answer that.

A. I really can't follow that.

Q. Sure. I'll ask it this way: The more locations where Rap-A-Lot Records are sold, the more likelihood there is of increased sales of Rap-A-Lot Records, correct?

A. If our type of customers are there, yes.

Q. As a result — understanding that you don't consider the states specifically but, as a general rule, N-The Water Publishing, like Rap-A-Lot, wants Rap-A-Lot Records in as many locations for sale as possible, correct?

A. That I really can't answer because there are just places that I know from personal knowledge of Rap-A-Lot, we just don't go.

Q. Do you want Rap-A-Lot Records sold in Tennessee? And when I say you, I mean N-The Water.

A. N-The Water? I'm not excluding any state. I'm just saying I can't include it.

MS. DAVIS: I'll object to that answer as nonresponsive.

Q. (BY MS. DAVIS) My question is this: You said there are certain places where N-The Water Publishing and Rap-A-Lot just don't want to go. My question to you is —

A. No. I said don't go.

Q. Don't go. Okay. Now, my question to you, does Rap-A-Lot Records sell records in the State of Tennessee?

MR. FASTHOFF: Objection. Calls for speculation.

Q. (BY MS. DAVIS) If you know. Only if you know.

A. I would be guessing.

* * *

[Toval 35:24-36:24]

Q. (BY MS. DAVIS) If you don't know, as a publisher, how your musical compositions get sold in Tower Records or Wherehouse Music, please, by all means, tell me that.

A. Well, you know, actually, I don't.

Q. Okay.

A. I can speculate.

Q. I don't want you to speculate. I want you to be clear. It is my understanding now of your testimony that you can't tell me the procedure by which a musical composition in which N-The Water Publishing owns the copyright would be sold on a sound recording in Nashville, Tennessee. You just would have to speculate to tell me that?

A. Since I don't work for the distributor and don't know their policies and procedures, I would have to speculate how they sold anything anywhere. All I can say is that I gave the right to someone to put it on wherever they put it and how they sell it to wherever they sell it is their own system.

Q. And you have no knowledge of the Rap-A-Lot manufacturing or distribution system, that's your testimony, Mr. Toval?

MR. FASTHOFF: Objection. Asked and answered.

A. Internal workings, no.

* * *

[Toval 39:10-40:15]

Q. (MS. DAVIS): The EMI Manufacturing & Distribution arm?

A. Yes.

Q. Correct.

A. I don't understand their internal workings. I don't understand how they solicit sales or who they solicit sales to. I do know that they solicit sales for products that I have licensed.

Q. And all I want to know is your understanding of how that happens. What happens? You sign a mechanical license as a publisher to a record company. What is your understanding of the chain of what happens next?

(MR. FASTHOFF): Objection. Calls for speculation.

Q. (MS. DAVIS): If you know. If you don't know, that's fine.

A. I'll give you my understanding because we don't need to go through this again. I sign a mechanical license for a record company, who in turn has a license deal with a manufacturer, who in turn has a — well, who also is tied to a distributor. Now, I assume, as you said, that they will sell as many records as possible. How they go to where they go to, I don't have the slightest idea. That would be my guess and as long as they help me sell as many as possible. So, I hope — I'm not trying not to answer your question. You ask me specific things

about specific workings and my honest answer is I don't know. You probably have people that work for you and as long as they get the job done within your parameters, you may not get the details. I don't always have all the details and you're asking me about details.

* * *

[Toval 43:19-44:1]

Q. What are the activities of N-The Water Publishing as a music publisher?

A. Primarily mechanical licensing and — well, actually, signing song writers, mechanical licensing and registering with performance rights. That makes up 90 to 95 percent of the work.

Q. And then collecting royalties, I would assume?

A. All that is included.

* * *

Appendix

[Toval 46:4-17]

Q. Who at Rap-A-Lot Records would be the person that I would need to talk to to determine how a musical composition from N-The Water Publishing would end up on a CD in a Wherehouse Music or a Tower Records in Nashville, Tennessee?

A. At Rap-A-Lot?

Q. Yes.

A. I don't think anybody at Rap-A-Lot could tell you.

Q. It's your understanding that nobody at Rap-A-Lot Records knows how their records get distributed to Tennessee or other states?

A. I think they would have to work for the distributor.

* * *

[Toval 48:11-13]

Q. Okay. Does N-The Water Publishing own any other companies or entities?

A. No.

* * *

Appendix

[Toval 50:3-5]

Q. Other than the Houston office, does N-The Water have any additional locations?

A. No.

* * *

[Toval 50:10-15]

Q. Does N-The Water Publishing have a Web site?

A. Not currently.

Q. Did it previously?

A. No, but futuristically.

Q. Do you know what the Web address is going to be?

A. No.

* * *

Appendix

[Toval 51:11-19]

Q. Now, a mechanical license is a license in which a publisher grants the right — to a record company the right to include a musical composition on a sound recording, correct?

A. Yes.

Q. And in return, the record company then pays something called mechanical royalties to that publisher that granted the mechanical license, correct?

A. Yes.

* * *

[Toval 53:11-54:4]

Q. And from the release date of those subject sound recordings, on the whole on the royalty bearing sales, Rap-A-Lot has in turn paid to N-The Water mechanical royalties on records sold, on the subject sound recording records sold?

A. Yes.

Q. The mechanical licenses that N-The Water Publishing has granted to Rap-A-Lot in the subject musical compositions have a territory that is the world or worldwide, correct? If you're confused by that, let me change my question.

A. I think it's domestic. I'm not —

Q. That's what I was going to ask. In the mechanical licenses that N-The Water has granted to Rap-A-Lot in the subject musical compositions, the territory of the mechanical license has been at least domestic, meaning the United States?

A. Yes.

* * *

[Toval 57:25-59:1]

Q. And you knew that Rap-A-Lot Records was going to attempt to sell the subject sound recordings containing the subject musical compositions nationally, correct?

A. Yes.

Q. Including Tennessee?

A. Can we stipulate — I don't know if I can even say that.

Q. You better ask your lawyer before you stipulate to anything. That's a term of art.

MR. FASTHOFF:We'll stipulate that Tennessee is a state of the U.S.

Q. (BY MS. DAVIS) If we can have an agreement that every time that something is attempted to be done nationally and you agree with that, that that would specifically include Tennessee, I will not have to add — that will cut this deposition in half.

A. Here's what we could do. We don't exclude any state. We attempt to market nationally. So, there is nothing to exclude Tennessee. Now, when I say — if I were to say it includes Tennessee, it's almost like saying we're doing something specific to include Tennessee. I don't exclude any state. So, you know, that's —

Q. So, understanding that you don't do anything special for Tennessee that you don't do for other states and to your understanding Rap-A-Lot Records doesn't do anything special —

* * *

Appendix

[Toval 61:14-17]

Q. Do you have any knowledge of the number of subject sound recordings sold in Tennessee from release until the present?

A. No.

* * *

[Toval 62:13-63:4]

Q. Do you know the dollar amount generated from sales of the subject sound recordings in Tennessee?

A. No.

Q. Do you know the dollar amount of mechanical royalties received by N-The Water as a result of sales of the subject sound recordings containing the subject musical compositions in the State of Tennessee?

A. No.

Q. Do you know the dollar amount of publisher performance royalties received by N-The Water from performances of the subject musical compositions in the State of Tennessee?

A. I believe zero.

Q. And why do you know that number and not the others?

A. Because on all of the songs listed, I don't think I've ever received any performance royalties.

* * *

[Toval 70:23-71:13]

Q. So, tell me if I have the procedure right. Once an artist finds a musical composition that he wants to record and maybe after he's recorded it, depending on what's happened, the record company comes to N-The Water and says, "We want to use one of your musical compositions on our sound recording," am I right so far?

A. Mostly in our cases, it's an original composition.

Q. For instance, the artist has written the composition and wants to include it on his own album?

A. Yes.

Q. So, the record company then comes to N-The Water and says, "The artist is going to include his song, you own the publishing in it, we need to get a mechanical license from you," correct?

A. Pretty much, yes.

* * *

Appendix

[Toval 74:23-75:4]

Q. Has N-The Water granted mechanical licenses to record companies other than Rap-A-Lot?

A. Yes.

Q. What other record companies?

A. There's several. I don't remember them all. Warner Brothers, Deaf Jam, Jive. I guess almost all the majors we've granted a license at one point or the other.

* * *

[Toval 76:3-14]

Q. If you were back at the office and I asked you to determine for me the amount of mechanical royalties N-The Water had received from sales of sound recordings containing its musical compositions in the State of Tennessee, would there be a way to do that?

A. Impossible.

Q. Why?

A. There's just no state-by-state information.

Q. The information given to N-The Water from Rap-A-Lot does not indicate the states that the different records were sold in; is that correct?

A. That's correct.

* * *

[Toval 84:2-6]

Q. Have you ever had any discussions with anyone concerning the sale of any of the subject sound recordings or subject musical compositions on the Internet?

A. No.

* * *

[Toval 85:3-22]

Q. Have you ever taken any action to ask cdnow not to sell your music on cdnow?

A. I don't think N-The Water could do that.

Q. Because?

A. We've licensed things to the record company, so, no, N-The Water — that's not something N-The Water could do.

Q. In fact, once N-The Water granted the mechanical license or the typical mechanical license it grants to Rap-A-Lot Records, including the ones it granted on the subject musical compositions, how that musical composition is exploited on record or sound recording is pretty much out of N-The Water's hands, correct?

A. Domestically.

Q. Yes.

A. Yes.

Q. That is within the discretion of the record company and 85 percent of time of the time that's Rap-A-Lot?

A. Within the parameters of the license, yes.

* * *

[Toval 86:14-18]

Q. Right. And, in fact, N-The Water understands it doesn't have the right to specify those channels, that that's something that the record company is going to do?

A. We never negotiated the right if that's what you mean, yes.

* * *

Appendix

[Toval 86:19-87:5]

Q. Do you have any understanding as to how the dollars that a consumer spends purchasing Rap-A-Lot sound recordings, particularly the subject sound recordings reflected in these deposition exhibits, how those dollars flow through the chain back to N-The Water?

A. I don't think they would.

Q. Why do you think that?

A. In a typical retail arrangement, as I understand it, whatever the consumer spends goes to the retail establishment. The retail establishment has already bought, based upon whatever the agreed upon wholesale price, that particular item from the distributor.

* * *

[Toval 87:19-88:3]

Q. When we talk about Wherehouse Music in Nashville, Tennessee, at what point in the chain of distribution is it your understanding N-The Water Publishing would be paid a mechanical royalty on the sale of Thugged Out that ultimately is sold in Wherehouse Music?

A. At the time Wherehouse Music purchases the CD.

Q. From Noo Trybe Records?

A. From Noo Trybe Records, obviously, with some stipulation of a reserve for returns.

* * *

[Toval 95:15-18]

Q. The movie Dangerous Minds, do you recall what the terms of the sync license for that Havin Thangs musical composition was?

A. Somewhere in the neighborhood of 20,000.

* * *

[Toval 96:25-97:3]

Q. Other than the $20,000 on the sync fee, are you paid any continuing royalties? Is N-The Water paid any continuing royalties?

A. No. A sync fee is a one time thing.

* * *

Appendix

[Toval 103:23-104:6]

Q. I understand that but there are third parties in Tennessee that have a license from N-The Water to perform the subject musical compositions, aren't there?

A. I don't know.

Q. You don't know if there's any third party that has a license to perform your works?

A. I don't have privy to who ASCAP and BMI license these things to. You would have better knowledge of that than me. Okay. I gave them a national license.

* * *

[Toval 106:5-16]

Q. (BY MS. DAVIS) When you granted the mechanical license to Rap-A-Lot Records to include the Havin Thangs on the Somethin' Serious sound recording, did you expect them to license the Still N-The Water musical composition Havin Thangs nationally?

MR. FASTHOFF: Objection. Mischaracterizes the facts. Asked and answered.

Q. (BY MS. DAVIS) You can answer.

A. Same answer.

Q. Which is yes, you did?

A. No, which is everywhere they can domestically.

Q. That's going to be my answer.

* * *

[Toval 107:15-16]

Q. You didn't expect for it to be nationally?

A. I sign a license and they do what they want with it.

* * *

[Toval 116:22-117:11]

Q. (BY MS. DAVIS) Has N-The Water ever taken out any newspaper ads?

A. Not that I recall.

Q. Placed any television ads?

A. No.

Q. Done any radio spots?

A. No.

Q. Been involved in any direct mail campaigns?

A. No.

Q. Participated in any advertising of record clubs?

A. No.

Q. Done any magazine advertising?

A. I don't think so.

Q. Any Internet advertising?

A. No.

* * *

[Toval 123:11-22]

Q. And, in fact, it says your initial affiliation [with ASCAP and BMI] was with the contact with Tennessee.

A. No. That's not how I read that and that's not how I interpret that.

Q. How do you interpret that?

A. The way I interpret that, if you want me to reword it, is my initial affiliation with ASCAP and BMI is

the only way that you can say I've had any contact with Tennessee because they have an office in Tennessee but I've never contacted that office, not once.

Q. You've never spoken to the office in Tennessee?

A. Not once.

* * *

[Toval 142:11-18]

Q. Does N-The Water have any input regarding any of the distribution agreements into which Rap-A-Lot enters?

A. No.

Q. Does it have any input into any of the manufacturing agreements into which Rap-A-Lot enters?

A. No.

* * * *